

Rule 5, Ariz. R. Crim. P.

PRELIMINARY HEARINGS – Magistrate may not amend complaint *sua sponte*; time limit to determine probable cause.....Revised 12/2009

At the end of the preliminary hearing, the magistrate must determine whether or not the State has carried its burden of showing probable as to probable cause. Accordingly, the magistrate's choices are limited to whether or not the defendant is to be bound over. In *State v. Superior Court*, 137 Ariz. 534, 672 P.2d 199 (App. 1983), the Court of Appeals clearly stated that the magistrate may not amend the complaint *sua sponte*, but must make the probable cause determination based on the charge that the prosecution set forth in the complaint, or on the charge as amended by the prosecution to conform to the available evidence. *Id.* at 535, 672 P.2d at 200-01 (App. 1983). The Comment to Rule 5.4(b) states that the magistrate "has no power to amend the charge; he must either bind the defendant over or dismiss the complaint. Thereafter the prosecutor may file another complaint. This is the Arizona rule."

The magistrate's determination whether probable cause exists must be timely, and in no case may the magistrate take longer than three days to make that determination. See *State ex rel. Berger v. Jennings*, 110 Ariz. 441, 443, 520 P.2d 313, 315 (1974).